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Tan Kok Siang v Kemuning Setia Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02 (NCVC)(W)-1527–08 OF 2016
ABANG ISKANDAR, BADARIAH SAHAMID AND MARY LIM JJCA
16 OCTOBER 2017

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Contract — Breach — Contract of employment — Appellant employed as project manager for housing project by respondent — Appellant resigned from employment before completion of project — Respondent sued for refund of consideration advanced to appellant — Appellant counterclaimed for payment of balance of agreed remuneration, delivery of vacant possession and liquidated damages — High Court allowed respondent's claim and dismissed appellant's counterclaim — Whether learned judge's findings, views and application of s 40 of the Contracts Act 1950 erroneous — Whether appellant in breach of fundamental term of employment contract — Whether respondent entitled to terminate employment contract — Whether respondent waived right to terminate contract — Whether respondent adduced evidence of loss — Contracts Act 1950 ss 40, 65 & 66

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Land Law — Sale and purchase of property — Sale and purchase agreement — Breach — Appellant purchased one unit terrace house from respondent — Respondent failed to deliver vacant possession — Whether respondent in breach of sale and purchase agreement

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The appellant and the respondent had two contractual relationships, the first being an oral contract ('the employment contract') between the two parties whereby the appellant was employed as project manager for a housing project ('the project'); and the second being a sale and purchase agreement ('the SPA') between the parties for the purchase of one unit of terrace house by the appellant. The respondent claimed that it had advanced the sum of RM500,000 as consideration for the employment contract in the form of a discount for the purchase of the house by the appellant. The appellant had resigned before the project was completed and his letter of resignation was accepted by the respondent's CEO ('PW1') without protest. Problem arose when PW1 had approached the appellant and asked for the refund of the said RM500,000 discount together with interest because the appellant had resigned prematurely. The appellant refused to refund the said amount and consequently, the respondent sued the appellant. The appellant counterclaimed for payment of the balance of agreed remuneration, delivery of vacant possession of the property under the SPA, and liquidated damages. The

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learned High Court judge allowed the respondent's claim and dismissed the appellant's counterclaim. The High Court judge found that since the appellant had refused to perform the employment contract in its entirety, the appellant had in fact repudiated the contract and was not entitled to the payment under s 40 of the Contracts Act 1950 ('the CA'). The learned judge further found that the appellant was disentitled to his claim under the SPA by reason of his conduct under the employment contract. Aggrieved by the decision, the appellant filed the present appeal. The sole basis of the respondent's claim in the High Court was s 40 of the CA.

Held, allowing the appeal, setting aside the decision of the High Court, dismissing the respondent's claim and allowing the appellant's counterclaim with costs of RM30,000:

(1) The learned judge's findings, views and application of s 40 of the CA was plainly erroneous. Section 40 of the CA was not about non-performance of contracts for its entirety but about performing contracts in its entirety. If the term was not a fundamental term of the contract, and there had been substantial performance, the termination was unlawful. In the present case, the appellant's promise to stay until the end of the project was not a term which was fundamental to or was at the root of the employment contract. What was fundamental were the significant responsibilities that the appellant was entrusted with and which he had attended to successfully. It could not be denied that there had been substantial performance of the employment contract by the appellant. Therefore, the appellant was not in breach of a fundamental term when he left. Further, it was apparent that the appellant's decision to leave was due to the respondent's own breach in not paying the agreed amount of RM1m after the appellant had substantially and successfully performed his duties. As a party in breach, the respondent was not entitled to terminate the contract (see paras 11, 27, 34 & 36).

(2) The learned judge had overlooked the fact that even if for a moment the respondent had a right to terminate, the respondent had waived that right when it accepted the appellant's resignation without reservation or terms. As such, the respondent was not entitled to terminate the oral employment contract and to a refund of the advance. In addition, the respondent had not adduced any evidence of loss. The sum of RM500,000 could not be ordered to be returned under ss 65 and 66 of the CA given that the validity of the oral contract was never in issue (see paras 37–38).

(3) The arrangements between the parties in relation to the SPA were entirely separate and distinct from those that arise under the employment contract. Since it was not in dispute that the subject property under the SPA was completed in January 2015 and ready for delivery of vacant

possession in March 2015, the respondent's failure and refusal to deliver vacant possession under the SPA to the appellant amounted to a breach of the clear terms of the SPA. As such, the appellant was entitled to an order for specific performance of the terms of the SPA. The respondent was obliged to hand over vacant possession and pay liquidated damages for the late delivery (see paras 41 & 43).

[Bahasa Malaysia summary

Perayu dan responden mempunyai dua hubungan kontraktual, pertama adalah kontrak lisan ('kontrak pekerjaan') di antara dua pihak di mana perayu diambil bekerja sebagai pengurus projek bagi projek perumahan ('projek'); dan kedua perjanjian jualbeli ('PJB') di antara pihak-pihak bagi pembelian satu unit rumah teres oleh perayu. Responden mendakwa bahawa ia telah memberi jumlah sebanyak RM500,000 sebagai balasan bagi kontrak pekerjaan dalam bentuk diskaun bagi pembelian rumah oleh perayu. Perayu telah meletakkan jawatan sebelum projek siap dan surat peletakan jawatannya diterima oleh CEO responden ('PW1') tanpa membantah. Masalah berbangkit apabila PW1 telah berjumpa dengan perayu dan meminta membayar balik wang RM500,000 diskaun bersama dengan faedah kerana perayu telah meletak jawatan pra matang. Perayu enggan membayar balik jumlah tersebut dan akhirnya, responden menyaman perayu. Perayu menuntut balas bagi bayaran baki gaji yang dipersetujui, penyerahan milikan kosong haratanah di bawah PJB, dan ganti rugi ditetapkan. Hakim Mahkamah Tinggi yang bijaksana membenarkan tuntutan responden dan menolak tuntutan balas perayu. Hakim Mahkamah Tinggi mendapati bahawa memandangkan perayu enggan melaksanakan kontrak pekerjaan dalam keseluruhannya, perayu sebenarnya telah membatalkan kontrak dan tidak berhak kepada bayaran di bawah s 40 Akta Kontrak 1950 ('AK'). Hakim yang bijaksana selanjutnya mendapati bahawa perayu tidak berhak kepada tuntutannya di bawah PJB atas alasan pelakuannya di bawah kontrak pekerjaan. Tidak puas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Satu-satunya asas tuntutan responden di Mahkamah Tinggi adalah s 40 AK.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, menolak tuntutan responden dan membenarkan tuntutan balas perayu dengan kos sebanyak RM30,000:

(1) Dapatan, pandangan dan penggunaan s 40 AK oleh hakim yang bijaksana jelas salah. Seksyen 40 AK adalah bukan mengenai kontrak yang tidak dilaksanakan secara keseluruhannya tetapi mengenai pelaksanaan kontrak secara keseluruhannya. Jika terma bukan terma asas kontrak, dan terdapat pelaksanaan yang substansial, penamatan kontrak adalah salah dari segi undang-undang. Dalam kes ini, janji perayu untuk bekerja sehingga tamatnya projek bukan terma yang mana adalah asas atau adalah akar kontrak pekerjaan. Apa yang adalah asas adalah

tanggungjawab yang penting yang diamanahkan ke atas perayu dan yang mana telah dilaksanakan dengan jayanya. Ia tidak boleh dinafikan bahawa terdapat pelaksanaan substansial terhadap kontrak pekerjaan oleh perayu. Oleh itu, perayu tidak melanggar terma asas apabila dia meninggalkan pekerjaan. Selanjutnya, ia adalah jelas bahawa keputusan perayu untuk meninggalkan pekerja adalah akibat pelanggaran responden sendiri kerana tidak membayar wang sejumlah RM1 juta yang dipersetujui selepas perayu telah secara substansial dan berjaya melaksanakan tugas-tugasnya. Sebagai pihak dalam pelanggaran, responden tidak berhak untuk menamatkan kontrak tersebut (lihat perenggan 11, 27, 34 & 36).

(2) Hakim yang bijaksana telah tertinggal fakta bahawa walaupun untuk seketika responden mempunyai hak untuk menamatkan kontrak, responden telah melepaskan hak tersebut apabila ia menerima peletakkan jawatan perayu tanpa syarat. Dengan itu, responden tidak berhak untuk menamatkan kontrak pekerjaan lisan dan untuk pembayaran balik pendahuluan. Selanjutnya, responden tidak mengemukakan apa-apa keterangan mengenai kerugian. Jumlah RM500,000 tidak boleh diperintahkan untuk dikembalikan di bawah ss 65 dan 66 AK mengambil kira kesahan kontrak lisan yang tidak pernah menjadi isu (lihat perenggan 37–38).

(3) Penyusunan di antara pihak-pihak berkaitan PJB tersebut adalah berasingan keseluruhannya dan berbebza daripada yang berbangkit di bawah kontrak pekerjaan. Memandangkan ia tidak dipertikaikan bahawa hartanah tersebut di bawah PJB adalah siap dalam bulan Januari 2015 dan sedia untuk penyerahan milikan kosong dalam bulan Mac 2015, kegagalan dan keengganan responden untuk menyerah milikan kosong di bawah PJB tersebut kepada perayu merupakan pelanggaran terma-terma jelas PJB. Dengan itu, perayu berhak kepada perintah untuk pelaksanaan spesifik terma-terma PJB. Responden bertanggungjawab untuk menyerahkan milikan kosong dan membayar ganti rugi ditetapkan bagi penyerahan lewat (lihat perenggan 41 & 43).]

Notes

For cases on contract of employment, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3816–3817.

For cases on sale and purchase agreement, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4914–4916.

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675, CA (refd)

Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener) [2011] 4 MLJ 173; [2011] 2 AMR 281, CA (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)
Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)
Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd [1998] 3 MLJ 860, CA (refd)
Muralidhar Chatterjee v International Film Company AIR 1943 PC 34; [1942] LR 70 IA 35, HC (refd)
Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor [2006] 2 MLJ 116, CA (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)
Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)

Legislation referred to

Contracts Act 1950 s 40, 65, 66, 74
Housing Development (Control and Licensing) Act 1966 s 24
Housing Development (Control and Licensing) Regulations 1989 reg 11, Schedule G
Indian Contract Act 1872 [IND] s 39

Appeal from: Civil Action No 22NCVC-211–12 of 2015 (High Court, Pulau Pinang)

Simon Murali (Jamie Ting Cheng Ning with him) (Lio & Partners) for the appellant.
Tan Beng Hong (Tan Beng Hong & Co) for the respondent.

Mary Lim JCA (delivering judgment of the court):

BACKGROUND

[1] In the claim before the High Court, the respondent, a housing developer and the appellant, an individual, had two contractual relationships.

[2] The first was via an oral contract made in 2009. In this oral contract, Tan Swee Leong ('PW1'), better known as Steven Tan, the chief executive officer (CEO) of the respondent approached the appellant with an offer that the appellant work as its project manager in its housing project known as 98 Greenlane Lintang Gangsa ('the project'). The appellant was required to serve as project manager until the completion of that project. For ease of reference, this will be referred to as the 'employment contract'.

A **[3]** The amount of consideration under this employment contract is disputed. The appellant maintains that it was for RM1m whereas the respondent claimed that it was for RM500,000. The respondent claimed that it had advanced the appellant this sum of RM500,000 via a discount for the same amount in the second contractual relationship between the parties.

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[4] The second contractual relationship between the parties arose when the appellant purchased from the respondent one unit of three-storey terrace house in the project vide sales and purchase agreement dated 10 January 2013. For this purchase, the respondent gave the appellant a discount of RM500,000 off the purchase price of RM1,068,000. A credit note was issued on 12 May 2014. The appellant took out a housing loan to finance the payment of the balance of the purchase price. This second contractual arrangement will be referred to as the 'sales and purchase agreement' ('SPA').

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[5] The appellant resigned before the project was completed. He resigned on 17 July 2014 after having worked for the respondent for five years. His letter of resignation was accepted by PW1, without protest.

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[6] It is not in dispute that during his tenure as project manager, the appellant played a key role. Amongst others, the appellant liaised with the relevant authorities in procuring the necessary approvals of the local authority for planning and for building plans, liaised with various persons such as the consultants for the project, the landowners and solicitors and also generally assisted in the eviction of squatters on the land so that the project could be built.

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[7] A year after the appellant resigned, PW1 met the appellant at Starbucks Café at Seagate, Penang. There, PW1 informed the appellant that the respondent wanted the appellant to refund the discount of RM500,000 together with interest because the appellant had resigned prematurely. PW1 also suggested the appellant sell the three-storey terrace house as the value of the house was said to be in the region of RM1.3m. According to PW1, the respondent wanted the refund because it was disappointed and shocked with the appellant's resignation as he had left the respondent's employment at a time when his services was most needed. The respondent was left in a quandary and the appellant's resignation had delayed the respondent's project. PW1 testified that the respondent decided to wait for the project to complete before claiming the refund from the appellant. The project was completed in March 2015; it was then ready for delivery. When the appellant refused to refund the RM500,000, the respondent sued.

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[8] The appellant counterclaimed for payment of the balance of agreed remuneration, delivery of vacant possession of the property under the SPA, and liquidated damages.

DECISION OF THE HIGH COURT

[9] The learned High Court judge allowed the respondent's claim and ordered a refund of the RM500,000 after finding that the appellant was in breach of the employment contract. The counterclaim was dismissed on the basis that the appellant was not entitled to delivery of vacant possession and liquidated damages. The learned High Court judge found that since the appellant had refused to perform the employment contract in its entirety, the appellant had in fact repudiated the contract and was not entitled to payment under s 40 of the Contracts Act 1950. Consequently, the appellant's argument that he had substantially performed part of the contract, as much as 90% and hence is entitled to keep the money, was rejected by the learned judge. According to the learned judge:

> The concern of the court is not what the defendant has performed. But what he has promised. In this case, the defendant has admitted he had breached his promise. When he resigned prematurely, the defendant agreed he had disabled himself from performing his promise in its entirety. The effect of which, the plaintiff is entitled to apply s 40 of the Contracts Act 1950 and put an end to the agreement.

[10] The learned judge proceeded to find that the respondent had rightly accepted the appellant's repudiation, 'and the contract no longer exists. Since the defendant is not entitled to gain any benefit under the contract, he had to return the said RM500,000 to the plaintiff pursuant to s 66 of the Contracts Act 1950'. The appellant, therefore, had to repay the advance received, together with interest. The learned High Court judge cited *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 in support.

DECISION OF THIS COURT

[11] After hearing respective learned counsel and upon due consideration of their oral submissions, written submissions and the records of appeal, we allowed the appeal. We essentially took the view that the learned High Court judge erred on both counts, in allowing the claim and in dismissing the counterclaim. We found the learned judge's findings, views and application of s 40 of the Contracts Act 1950 plainly erroneous and must be set right. We further found the termination by the respondent wrong and unlawful, and that the appellant had substantially performed his contractual obligations under the oral employment contract. Even if the appellant was in breach, which we did not find to be the case, we also found that the respondent was not entitled to

rescission of contract. Consequently, we were amply satisfied that this was a suitable case for appellate intervention and we allowed the appeal and set aside the decision of the High Court. These are our reasons in full.

SECTION 40 OF THE CONTRACTS ACT 1950

[12] Leaving aside for the moment the question of whether the agreed sum payable to the appellant is RM500,000 or RM1m, we observe that the sole basis of the respondent's claim is s 40 of the Contracts Act 1950. The respondent's claim is that because the appellant resigned before the agreed event or time, which is when the project is completed, the appellant has disabled himself from performance of the employment contract. Thus, the respondent is entitled to terminate the contract and sue for recovery of monies paid to the appellant. The reliefs sought included declaratory orders recognising the respondent's entitlement and an order that the appellant refund the RM500,000 that was advanced together with interest.

[13] The learned judge found the claim proved, that the employment contract was a 'conditional contract in the sense that the defendant is entitled to receive the sum of RM500,000 only if he continues to serve as the plaintiff's project manager until the project is completed'. The money was however, paid to the respondent in advance. According to the learned judge, when the appellant 'accepted the RM500,000 in advance, he has contractually agreed that he will carry out his duty as the project manager until the project is completed'. For this reason, the learned judge concluded that this is the 'contract for its entirety'; that the relationship between the parties is 'not like main contractor and subcontractor where the amount of work done can be measured by a quantity surveyor'; it is, in effect, a 'one off contract for completion of the project'. Her Ladyship found that the appellant knew the respondent 'relied on his services to complete the project without any glitches. He also agreed that because of his premature resignation, he had caused hardship to the plaintiff and delay in the project. For these reasons, he ought to have known that the purpose the money was paid in advance was to ensure that he would not leave the plaintiff without fulfilling his promise. The defendant must understand if he resigned before the project is completed, he is not entitled to get RM500,000'.

[14] Put another way, the appellant had agreed to be project manager until the project was completed; and it is at that point in time that he will be paid. It is in that sense that the learned Judge understood the contract is 'for' its entirety. The fact that the payment was in the form of an advance did not alter that agreement. In the learned judge's understanding, the 'entirety' of the contract refers to the appellant staying until the end of the project. Until and unless the project is completed, the appellant cannot leave and will not in fact

be paid or be entitled to any payment. Therefore, by all accounts, leaving any sooner would amount to a repudiation of contract entitling the respondent to rescind the contract.

[15] With respect, this conclusion and understanding by the learned judge is plainly erroneous and demonstrates misapprehension of s 40 of the Contracts Act 1950. That section reads as follows:

> When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuances.

[16] Two illustrations are given in s 40. Although neither illustration describes the present circumstances, they are insightful as to the meaning and application of s 40. Both illustrations concerned a contract to perform, that is, to sing for certain number of nights per week for two months. The payments in both cases was at a certain rate per night of performance. In the first illustration, the singer fails to turn up after six nights in which case the manager, the innocent party, is at liberty to put an end to the contract. In the second illustration, the singer similarly fails to turn up on a promised night but turns up subsequently with the assent of the manager. In the second scenario, the contract cannot be put to an end. The remedy is only in damages for the night when the singer did not perform.

[17] To understand s 40, we will need to 'hearken to first principles, for it is a failure to appreciate these, we apprehend, which is the cause of confusion in the mind of the appellant …' per Gopal Sri Ram JCA (as he then was) in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675 at p 681. From the provisions of s 40, it is apparent that a contract is not automatically brought to an end by a repudiatory breach. The right to terminate or rescind a contract is not available in every case of repudiation. That right is dependent on, inter alia, the nature of the term breached, and the conduct of the parties, 'whether the breach is of sufficient gravity to allow the other party to rescind the contract' — see Visu Sinnadurai on the *Law of Contract*, p 941. In the Court of Appeal's decision in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675, the 'first principles' were reminded and it is the function of the trial court to examine all the evidence led and determine the real facts in order to come to a decision on those material first principles:

> Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie the party who is not guilty of the breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being

discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce a further consequence. A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of a contract.

Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed.

[18] At p 682, the Court of Appeal further opined:

Another approach to the problem in cases that involve synallagmatic contracts is to look at the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.

[19] Where that right properly exists in law and on the facts, the innocent party can elect to either terminate or rescind or, carry on with the contract. The common law doctrine of election applies. This was explained by Seah FJ in *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290:

A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contact the repudiation is what is called *brutum fulman* that is, the parties are left with their rights and liabilities as before.

[20] This was also discussed by the Court of Appeal in *Leong Weng Choon v Consolidated Leasing (M) Sdn Bhd* [1998] 3 MLJ 860:

In other words, the plaintiff could either accept the repudiation by terminating the agreement or he could ignore the breach by treating the contract as alive and subsisting. As a matter of fact as well as on the pleadings, the plaintiff did not terminate the contract despite the repudiation by the first defendant so that the contract is still subsisting.

[21] Where the innocent party elects to affirm the contract, the contract is treated as still continuing with the rights and obligations of both parties still intact and, each party has a right to sue the other for damages — see Visu Sinnadurai on the *Law of Contract* (4th Ed, LexisNexis), pp 938–940. However, where the election is to terminate, rescind or end the contract by reason of the breach, the innocent party is itself released from further performance of the contract. This was explained by Sir George Rankin in

Muralidhar Chatterjee v International Film Company AIR 1943 PC 34; [1942] LR 70 IA 35 (PC). In that case, the Privy Council was dealing with s 39 of the Indian Contract Act, which is similar to s 40 of our Contracts Act 1950:

> In a case within section 39, the party who *rightly* 'puts an end to' or 'rescinds' the contract is entitled to damages for the defaulting party's breach. In this sense, the contract has not ceased to be 'enforceable by law'. On the other hand, neither party is any longer bound to perform his promise — indeed an offer to do so, if made by either party, could properly be rejected by the other. The election of the party rescinding, as Cotton LJ once put it, 'relieves the other party from any further obligation under the contract and enables both parties to make arrangements for the future on the footing that the contract has been once for all broken and is at an end': *Johnstone v Milling* (1886) 16 QBD 470. (Emphasis added.)

[22] The right to terminate may also be waived as happened in the case of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151. There, the Federal Court examined the conduct of the parties to see if the right to rescind the contract upon the occurrence of a repudiatory breach had been waived by the other party. Upon examination, the Federal Court found that there was evidence of waiver; consequently, the right to rescind was no longer available and the contract was deemed to be still subsisting.

[23] Further, the right to terminate may be lost where the party terminating the contract is in fact guilty of some wrongdoing. In *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302, the Supreme Court observed:

> The rule is that if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract, vide the judgment of Lord Atkinson in *New Zealand Shipping Company Ltd v SDAECD France* [1919] AC 1.

[24] See also Court of Appeal's decisions in *Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor* [2006] 2 MLJ 116; *Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580, *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)* [2011] 4 MLJ 173; [2011] 2 AMR 281.

[25] In order to determine the rights and obligations of the parties, the terms of the oral contract would have to be established. The trial judge was obliged to determine not just the promise or what the promise was all about, but also the terms surrounding that promise. Of course, if there were none, it would be

proper for the trial judge to rightly say that the promise and thereby the contract was only about the appellant working as the respondent's project manager until the project is completed at which time the respondent will pay the appellant RM500,000. Because the employment contract is an oral contract, the trial judge must test the oral testimonies against any contemporaneous documents produced and admitted at trial, and explain why one set of evidence is preferred over the other.

[26] The learned judge claimed to have done that; and in so doing found the appellant's agreement to carry out his duty as the project manager until the project is completed to be a one-off contract for completion of the project, and in that sense, a contract for its entirety. The learned judge accepted the respondent's claim that the purpose for which the money was paid in advance was to ensure that the appellant did not leave the respondent without fulfilling his promise. The learned judge rejected the appellant's version of the employment contract because the documentary evidence did not support it.

[27] Again, with respect, the learned judge fell into error. In *Pollack & Mulla: Indian Contract and Specific Relief Acts* (12th Ed, Vol 1), p 1000, the learned authors explained that a refusal to perform any part of the contract, however small, is a refusal to perform the contract 'in its entirety'. The 'kind of refusal contemplated in s 40 is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for'. Section 40 is not about non-performance of contracts *for* its entirety but about performing contracts *in* its entirety. This points to the significance of the particular term of the contract which is not performed; it may be a small part or it may be the whole of the agreement; and the issue of substantial performance of that term is also relevant. If the term is not a fundamental term of the contract, and there has been substantial performance, the termination is unlawful. This was, inter alia, determined by the Federal Court in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597:

> Special attention should be paid to the phrase 'in its entirety'. Under the section, the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.

[28] It is interesting to see the pleaded case of the respondent. At para 2 of the statement of claim, the respondent pleaded that the appellant was the 'former Project Manager of Pearl Island Resort Development Sdn Bhd and the plaintiff until 17-07-14'. At paras 3, 4 and 5, the respondent alleged:

> 3. Sometime in 2009 whilst in the employ of Pearl Island Resort Development Sdn Bhd, the defendant orally agreed with the plaintiff for valuable consideration to act

and serve as the plaintiff's Project Manager for the project known as 98 Greenlane Lintang Gangsa until the completion of the said project.

4. In consideration thereof, the plaintiff specially set aside for the defendant a unit of 3 storey Terrace House, Plot 31, Lot No, 10131 held under HSD 17851, Section 5, DTL George Town, Penang priced at RM1,068,000.00 less RM500,000.00.

5. On 17-07-14 the defendant tendered his resignation to Pearl Island Resort Development Sdn Bhd as its Project manager with effect from 17-04-14 and at the same time, disabled himself from the further performance of his promise to the plaintiff in its entirety when the plaintiff's project was still pending completion.

[29] To this, the appellant avers at paras 2, 4 and 5 of the defence and counterclaim, that he was never the respondent's project manager. He was its general manager for the respondent's project. The appellant claimed that he was appointed by Pearl Island Resort Development Sdn Bhd to be its project manager. This issue was later, not pursued.

[30] The appellant claimed that he was not paid any salary by the respondent. Instead, the respondent orally agreed to pay the appellant RM500,000 when the building plans for the project were approved and a further sum of RM500,000 when the project was completed. When the plans were approved, the respondent did not pay the appellant the RM500,000 that was agreed. The respondent instead, issued the appellant a credit note in the form of a discount for the same amount for the purchase of the unit earlier described.

[31] This version was rejected by the learned judge on the basis that it was an afterthought, not supported by contemporaneous documents and by the overall circumstances of the case. The contemporaneous documents referred to by the learned judge appear to be the respondent's solicitors' notice of demand which was unanswered by the appellant. In the learned judge's view, if the appellant 'strongly believed he is entitled to RM1m, he should have replied immediately to the notice of demand, putting his case and claim for RM500,000'. The appellant's explanation that he was advised by his lawyer to not reply was rejected by the court.

[32] We are of the view that in the first place, the notice of demand is not contemporaneous documentary evidence of the employment contract. This notice was issued in anticipation of a civil claim. It was incumbent on the trial judge to inquire as to the terms and conditions of the employment contract, what were the particular functions of a project manager, whether there was any truth or explanation as to the matters relied on by the appellant. Surely the employment contract cannot be about being a project manager for a duration, period. That engagement must logically and reasonably entail certain

responsibilities and functions required of the appellant as project manager. These matters required examination in order to answer the issue of fundamental term. Had the learned judge examined the evidence properly, Her Ladyship would have found that the respondent did not dispute the functions described by the appellant; that in fact, the respondent agreed that the appellant was responsible for and had procured the necessary approvals and re-approvals when the plans were amended.

[33] In this regard, the evidence show that the planning permission was given by the local authority on 16 December 2009 while the building plan was approved on 19 May 2010. Subsequently, an amended building plan was submitted and this amended plan was approved on 18 April 2012. Not only are there minutes of meetings to support these various actions of the appellant (see pp 191, 195 and 201 of the record of appeal *Jld* 2), but as already mentioned, the respondent has actually admitted to this effect. These are all silent, incontrovertible, independent and contemporaneous documentary evidence which the learned judge failed to have given any due regard. These pieces of evidence support the appellant's version of the terms of the employment contract, that he was engaged not just as project manager but as the person responsible for liaising with the relevant authorities so that the relevant approvals necessary for the project may be procured. This role is indeed an important role for the appellant as the lack of approvals will have adverse implications on the progress of the project. The absence of approvals must mean that the project simply cannot proceed.

[34] The learned judge did not give any weight to these evidence but instead, focused almost completely on the question of duration of the employment. We are of the view that this is erroneous given that this is an oral contract and it was incumbent upon the learned judge to ascertain the precise terms of the contract. Aside from that, it cannot be denied that there has been substantial performance of the employment contract by the appellant. This means that even if the appellant was in breach for leaving the respondent's employment before the completion of the project, the respondent is not entitled to terminate the employment contract under s 40.

[35] We further find irresistible inference offered by the SPA which supports the appellant's case, which evidence was ignored by the learned judge. The SPA for the sale of the three-storey house to the appellant is dated 10 January 2013 and the documents issued in relation to the SPA are more consistent with the appellant's version of the terms of the agreement. Again, this was not considered by the learned judge. From the pleaded case that was pointed out earlier, the respondent's case is that the RM500,000 was advanced. This must have been around 2009, when the appellant was first engaged as project manager. Yet, the evidence at trial was that the SPA was not signed until

10 January 2013. The SPA was followed by a credit note issued on 12 May 2014 and the respondent issued a letter dated 15 May 2014 to the appellant's lawyers in respect of the sale (see pp 259 and 212 of the record of appeal *Jld* 2). The dates of the SPA, credit note and the letter to the lawyers for the SPA indicate that RM500,000 was discounted from the sale of the property with a credit note for the balance were events which took place long after the employment contract had come into existence in 2009. All this shows that the terms of the employment contract are as explained by the appellant.

[36] The appellant's promise to stay until the end of the project is not a term which is fundamental to or is at the root of the employment contract. What is fundamental are the significant responsibilities that the appellant was entrusted with and which he had attended to successfully. Consequently, while the appellant may have left the respondent's employment at a date earlier than anticipated, he was not in breach of a fundamental term when he left. On examination of the reasons for that action, it is apparent that the appellant's decision to leave was brought about by the respondent's own breach in not paying the appellant the agreed sum of RM1m, after he had substantially and successfully performed the duties expected of him. As the party in breach, the respondent is not entitled to terminate the contract.

[37] What is further overlooked by the learned judge is the fact that even if for a moment the respondent has a right to terminate, the respondent has waived that right when it accepted the appellant's resignation without reservation or terms. Again, this is not in dispute. In our view, the respondent's demand, issued more than a year later, is more in the nature of an afterthought. At the material time of acceptance of resignation, there was no reference to the letter of appointment or to its terms; if it is as critical as now suggested by the respondent. Consequently, the respondent is not entitled to terminate the oral employment contract and to a refund of the advance.

[38] We are compelled to add that we agree with learned counsel for the appellant that the respondent has in any case, not adduced any evidence of loss. The sum of RM500,000 cannot be ordered to be returned under ss 65 and 66 of the Contracts Act 1950 given that the validity of the oral contract was never in issue. If any compensation was due to the respondent, it would be by virtue of s 74 and not, as discussed by the learned judge.

[39] For all the foregoing reasons, the appeal against the decision in respect of the respondent's claim must be allowed with costs.

[40] As for the counterclaim for delivery of vacant possession, this was dismissed by the learned judge on the basis that the appellant was disentitled to his claim under the SPA by reason of his conduct under the employment contract.

[41] Once again, we find this determination clearly erroneous on the facts and in law. The arrangements between the parties in relation to the SPA are entirely separate and distinct from those that arise under the employment contract. Undisputedly, the appellant has paid the full purchase price — see the credit note and the bank loan. Under the terms of the SPA, the respondent is further required to deliver up vacant possession. This would have been on 2 March 2015. In the event the respondent, as vendor under the SPA fails to deliver up vacant possession, cl 22 of the SPA provides:

22. Time for delivery of vacant possession

(1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 within twenty four (24) calendar months from the date of this Agreement.

(2) If the Vendor fails to deliver vacant possession of the said Building in the manner stipulated under clause 23 within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per cent, (10%) per annum of the purchase price from the expiry date of the delivery of vacant possession of the said Building. Such liquidated damages shall be paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Building.

[42] Clause 23 of the SPA provides:

23. Manner of delivery of vacant possession

(1) The Vendor shall let the Purchaser into possession of the said Property upon the following:

(a) the issuance of a certificate of completion and compliance certifying that the said Building has been duly constructed and completed in conformity with the approved plans and the requirements of the Street, Drainage and Building Act 1974 and any bylaws made thereunder;

(b) water and electricity supply are ready for connection to the said Building; and

(c) the Purchaser having paid all monies payable under sub-clause 4(1) in accordance with the Third Schedule and all other monies due

under this Agreement and the Purchaser having perfumed and observed all the terms and covenant on his part under this Agreement.

(2) The delivery of vacant possession by the vendor shall be supported by a certificate of completion and compliance certifying that the said Building is safe and fit for occupation and includes the handing over of the keys of the said Building to the Purchaser.

(3) Upon the expiry of fourteen days from the date of a notice from the Vendor requesting the Purchaser to take possession of the s aid Property, whether or not the Purchaser has actually entered possession or occupation of the said Property, the Purchaser shall be deemed to have taken delivery of vacant possession.

[43] The SPA under consideration is a standard statutory contract prescribed under s 24 of the Housing Development (Control and Licensing) Act 1966 read together with reg 11 of the Housing Development (Control and Licensing) Regulations 1989 and Schedule G to the Regulations. Since it is not in dispute that the subject property under the SPA was completed in January 2015 and ready for delivery of vacant possession in March 2015, the respondent's failure and refusal to deliver vacant possession under the SPA to the appellant amounts to a breach of the clear terms of the SPA. Even if the appellant was in breach of the oral employment contract, which we do not find to be the case, that breach is unrelated to the respondent's obligations under the SPA.

[44] For the reasons set out above, the appellant is entitled to an order for specific performance of the terms of the SPA. The respondent is obliged to hand over vacant possession and pay liquidated damages for the late delivery as per the terms of cl 22. Liquidated damages for such late delivery shall run from 10 January 2015 at the rate of 10%pa of the purchase price, which we take should be the full and not the discounted price.

[45] Consequently, the appeal on the cross-appeal is also allowed. The decision of the High Court is set aside. The respondent's claim is dismissed and the appellant's counterclaim is allowed in the terms sought with costs of RM30,000 subject to payment of allocator. The deposit is ordered to be refunded to the appellant.

A *Appeal allowed; decision of High Court set aside; respondent's claim dismissed; and appellant's counterclaim allowed with costs of RM30,000.*

Reported by Dzulqarnain Ab Fatar

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